85-1216

No.

Supreme Court, U.S.
FILED
JAN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JOHN D. O'CONNELL
Petitioner,

v.

MARYLAND STEEL ERECTORS, INC., et al
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the "Longshore and Harbor Workers' Compensation Act Amendments of 1984" are applicable to Workers' Compensation claims governed by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq., as made applicable to the District of Columbia by virtue of D.C. Code §§ 36-501 et seq (1973).

2. Whether the application of the Longshore and Harbor Workers' Compensation Act Amendments of 1984 cure the "lack of Standing" defect that caused dismissal of the action.

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IN THE

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OCTOBER TERM, 1985

No. _____

JOHN D. O'CONNELL
Petitioner,

v.

MARYLAND STEEL ERECTORS, INC., et al
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner respectfully requests that this Court grant a Writ of Certiorari to review the Decision and Order of the District of Columbia Court of Appeals dismissing Petitioner's appeal from an Order of Summary Judgment and denying a Petition for Rehearing and/or Suggestion for Rehearing En Banc. 495 A.2d 1134 (D.C. 1985), *reh'g denied*, No. 82-148 (D.C. Oct. 21, 1985).

OPINIONS BELOW

On the day of trial, a District of Columbia Superior Court Judge granted summary judgment in favor of the defendant Maryland Steel Erectors, Inc. on the authority of this Court's holding in *Rodriguez* v. *Compass Shipping-Co.*, 451 U.S. 596 (1981), which overruled the caselaw in

effect in the District of Columbia at the time. *See Potomac Electric Power Co.* v. *Wynn*, 343 F.2d 295 (D.C. Cir. 1965). This action was filed prior to *Rodriguez*, but nonetheless was held timebarred by the holding in that case because under *Rodriguez* the cause of action was possessed by the workers' compensation insurance carrier at the time the action was brought. Appendix C. The District of Columbia Court of Appeals opinion and order from which certiorari is sought appears as Appendix B. The order of the District of Columbia Court of Appeals dismissing the Petition for Rehearing and/or Suggestion for Rehearing En Banc, dated October 21, 1985, appears as Petitioner's Appendix A.

JURISDICTION

The District of Columbia decided this case on July 5, 1985. A timely Petition for Rehearing and/or Suggestion for Rehearing En Banc was filed and the Court filed a Response to the Petition. The Court denied the Petition for Rehearing on October 21, 1985, with two judges voting to rehear the case. Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1976).

RELEVANT STATUTES

The relevant statutory provisions are as follows:

The District of Columbia Code (1973):

§ 36-501. Longshoremen's and Harbor Workers' Compensation Act As Made Applicable to the District of Columbia.

> **The provisions of the Longshoremen's and Harbor Workers' Compensation Act, including all amendments that may hereafter be made thereto,**

shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in implying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia and the term "employee" shall be held to mean every employee of such person.

Pub. L. No. 98-426, 98 Stat. 1639 (1984):

§ 21 (a) Section 33(b) is amended to read as follows:

(b) Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For purpose of this subsection, the term 'award' with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

Effective Date

§ 28(a) Except as otherwise provided in this section, the amendments made by this Act shall be effective on the date of enactment of this Act and shall apply both with respect to claims filed after such date and to claims pending on such date.

28 United States Code § 1257(3)

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, where the validity of a . . . statute of the United States is drawn in question . . .
>
> For the purposes of this section, the term "highest court of a state" includes the District of Columbia Court of Appeals

1 U.S.C. § 109 (1982):

The repeal of any statute shall not have the effect to release any . . . liability incurred under such statute . . . and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability. D.C. Code § 1-206 (1981).

STATEMENT OF THE CASE

Petitioner, John D. O'Connell, commenced this civil action against the respondent Maryland Steel Erectors, Inc. for personal injuries on November 6, 1979 in the District of Columbia Superior Court, eight months after having received a formal award of compensation benefits. At the time suit was filed, petitioner's rights were governed by the principles enunciated in *Potomac Electric Power Co.* v. *Wynn,* 343 F.2d 295 (D.C. Cir. 1965), which held that an injured compensation claimant retained standing to sue a third party defendant even after the six-month assignment provision contained in 33 U.S.C. § 933(b) had run. On the

day of trial, December 16, 1981, the trial court granted summary judgment to the respondent on the authority of this Court's decision in *Rodriguez* v. *Compass Shipping Company,* 451 U.S. 596 (1981), which overruled *Wynn* and held the statutory assignment contained in § 933(b) to be an irrevocable assignment of the cause of action. While the case was on appeal, the Congress passed the Longshore and Harbor Workers' Compensation Act Amendments of 1984,[1] which amended § 933(b) to provide for a statutory reversion of the cause of action if the person to whom the statutory assignment was made did not commence suit within ninety days after having been assigned the cause of action[2] This new amendment was made applicable as of September 28, 1984, the date President Reagan signed the legislative amendments.[3]

On July 5, 1985, the District of Columbia Court of Appeals affirmed the entry of summary judgment by the trial court, holding in part that the 1984 Longshore Amendments are inapplicable to claims governed by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA)[4] as made applicable to the District of Columbia by the District of Columbia Workers' Compensation Act of 1928 (the 1928 Act).[5] The Court reasoned that the claims governed by virtue of the 1928 Act were not affected by the 1984 Longshore Amendments because a new, local act, which governs employment-related injuries occurring on and after July 26, 1982 in the District of Columbia, repealed the 1928 Act, thus preventing those 1978

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[1]Pub. L. No. 98-426, 98 Stat. 1639 (1984)

[2]Pub. L. No. 98-426, 98 Stat. 1639, Sec. 21(a) (1984).

[3]Id., Sec. 28(a) (1984).

[4]33 U.S.C. §§ 901 *et. seq.* (1982).

[5]D.C. Code §§ 36-501 *et seq.* (1973).

Act claims which continue to be governed by the LHWCA from being affected by the 1984 Amendments.

The petitioner filed a timely Petition for Rehearing and/or Suggestion for Rehearing En Banc, to which the Court of Appeals ordered the respondent to reply. The petition was denied on October 21, 1985, with two associate judges voting to rehear the case.

ARGUMENT

I. THE D.C. COURT OF APPEALS ERRED IN CONCLUDING THAT THE 1984 LONGSHORE AMENDMENTS DO NOT APPLY TO CLAIMS GOVERNED BY THE ACT.

The *O'Connell* Court's conclusion that the 1984 Longshore Amendments do not apply to cases governed by the 1928 Act begins with the Court's conclusionary, and erroneous statement that the City Council's repeal of the 1928 Act, "diverced the local workers' compensation system entirely from the Longshore Act of 1927." *O'Connell,* 495 A.2d at 1141. To the contrary, all the parties agree that only those injuries occurring after the effective date of the new law are divorced from the operation of the provisions of the Longshore Act and its administration by the United States Department of Labor. The District claims still governed by the provisions of the Longshore Act have never been, and are not now, divorced from the Longshore Act's compensation system. In fact there are two different statutory compensation schemes existing concurrently in the District today, one local and one federal. The *O'Connell* Court's misunderstanding of the concurrent workings of these statutory schemes is apparent, and is fatal to the logic of its decision. See *Henry* v. *George Hyman Construction Co.,* 749 F.2d 65 (D.C.

Cir. 1984); *Crum* v. *General Adjustment Bureau,* 738 F.2d 65 (D.C. Cir. 1984); *Randall* v. *Comfort Controls, Inc.*, 725 F.2d 791, 792 n. 2 (D.C. Cir. 1984); *Carter* v. *Director, OWCP,* 751 F.2d 1398, 1399 n. 1 (D.C. Cir. 1985); *Stevenson* v. *Linens of the Week,* 688 F.2d 93, 95 n. 1 (D.C. Cir. 1982).

The *O'Connell* Court then concluded that the federal savings statute preserved the appellant's right of action against third parties under the 1928 Act, but that the savings statute did not allow removal of limitations imposed under the 1928 Act pursuant to "subsequent Congressional amendment to another act." 495 A.2d at 1141-42. In so holding the Court demonstrated a profound misunderstanding of the relationship between the 1928 Act, the jurisdictional provision, and the Longshore Act itself, which is the substantive statute. The Court also neatly avoided addressing the points raised by Mr. O'Connell in his appeal. It is not the provisions of the 1928 Act that preserve a claimant's right to bring an action against negligent third parties, but rather the substantive provisions of 33 U.S.C. § 933(a). The 1928 Act contains no substantive provisions, and is merely a provision circumscribing jurisdiction and making the Longshore Act, and its future amendments, applicable to employers carrying on any employment in the District of Columbia. The 1928 Act's repeal simply prevented the applicability of the Longshore Act and its future amendments *to new injuries* occurring after the effective date of the new statute. It did not make the Longshore Act and its future amendments any less applicable to the injuries it continues to govern. The wisdom of Congress in making future amendments applicable to 1928 Act claims is unquestionable, since the Longshore Act and its many extensions are centrally ad-

ministered.[6] The *O'Connell* rationale not only frustrates the clear intent of both Congress and City Council, but will also hamper the fair and expeditious administration of 1928 Act claims and adversely impact 1928 Act claimants, a result clearly contrary to the oft-cited beneficient purposes of the Longshore Act. *See, e.g., Swinton* v. *J. Frank Kelly, Inc.,* 554 F.2d 1075 (D.C. Cir. 1976).

A second point raised by this Petitioner, and left unaddressed by the *O'Connell* Court, is whether the general savings statute saves the 1928 Act's incorporation clause as well as its jurisdictional provisions. *De La Rama Steamship Co.* v. *United States,* 344 U.S. 386 (1953) indicates that where the entirety of the statute is necessary to effectuate its purposes, then the *entire* statute is saved. Why or how the jurisdictional provision of the 1928 Act is "saved," while the clause incorporating future substantive amendments to the Longshore Act is nowhere addressed by the *O'Connell* Court. If the purpose of the savings statute in this setting is to preserve claimants' rights to future compensation benefits under the substantive provisions of the Longshore Act, then there is no reason why those rights and liabilities, which continue to accrue on a weekly basis and which will extend many years into the future, should not be measured by the Congressional wisdom reflected in legislative changes. *O'Connell's* interpretation of the general savings statute does not make sense because it disconnects the local employer-employee relationship under the statutory plan from the Longshore

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[6]There is also absolutely no rational reason why Congress would want to make its amendments applicable in the longshore industry and in every other context where the Longshore Act applies, but not in the District of Columbia.

Act.[7] There is absolutely no evidence that Congress intended such a ludicrous result, and the savings statute itself by no means compels the conclusion the *O'Connell* Court reaches. In fact, the Court's ultimate conclusion helps neither the employer nor his injured employee, but only a tortfeasor foreign to the statutory relationship. Contrary to the Court's conclusion, the 1928 Act had not "ceased to exist" for the parties subject to its jurisdictional coverage. *Id.* at 1142. For them, the 1928 Act and the Longshore Act remain fully viable, and for them the 1984

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[7]Uniform application of the Longshore Act and its measure of compensability have been seriously undermined by *O'Connell.* Under the Longshore caselaw, a worker may obtain benefits for disability for an occupational disease if the covered employment exposed him to injurious substances. *Todd Shipyards* v. *Black,* 717 F.2d 1280 (9th Cir. 1983). This is so even where the injured worker has sustained subsequent injurious exposure in non-covered employment. *Id.' Todd* v. *Todd Shipyards Corp.,* 16 BRBS 163 (1984)' *Smith* v. *Aerojet General Shipyard,* 16 BRBS 49 (1983). This rule has been uniformly followed in this jurisdiction under the 1928 Act, and many claimants have relied on this rule of law. Following *O'Connell,* however, one Administrative Law Judge has ruled that these precedents no longer apply in the District, and therefore no claim for benefits lies under the 1928 Act so long as the injured worker had an opportunity to obtain benefits in another jurisdiction where subsequent injurious exposure occurred. *McAbier* v. *Ball-Healy-Granite,* 84-DCWC-147 (ALJ Dunau, Aug. 20, 1985). Furthermore, the holding of *O'Connell* means that 1984 Longshore Amendments extending the statute of limitations (from one to two years) and liberalizing notice requirements (from 30 days to one year) in occupational disease claims will not govern the claims of Metro tunnel miners, a harsh result that will defeat the claims of many legitimately injured workers. See *Pryor* v. *James McHugh Const. Co.,* Case 85-LHC-114, where a claimant suffering from silicosis was denied benefits because *O'Connell* operated to preserve the 30 day written notice requirement. The claimant's notice, filed 33 days after seeing a lung specialist, was held fatally deficient despite the fact that documented silica dust exposures in excess of 294 times permitted OSHA levels were in the possession of the employer. These post *O'Connell* decisions highlight graphically the disintegration of the 1928 Act once it is disassociated from the Longshore Act.

Longshore Amendments have become a part of the substantive law governing their cases.

The *O'Connell* Court also indicates that it sees no evidence that Congress intended the 1984 Longshore Amendments to apply in any context except the maritime one. *Id.* at 1143-45. In fact the Court cites with apparent approval Congress' removal of certain employments from the ambit of the Longshore Act as support for the perceived limited applicability of these amendments. These conclusions are demonstrably incorrect and constitute clear error. The 1984 Longshore Amendments apply to all extensions of the Longshore Act except where specifically indicated otherwise.[8] Thus, the amendments will have a significant impact on the employer-employee relationship wherever the Longshore Act is the applicable substantive law. Furthermore, the Congress' removal of certain occupations from the ambit of the Longshore Act, far from supporting the Court's conclusion, shows clearly that Congress knows how to inform the courts when the Longshore Act and its amendments are not applicable. As Congressman George Miller indicated to the House of Representatives in his September 18, 1984 speech in support of the 1984 Longshore Amendments:

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[8]Apart from its application in the District of Columbia, Congress has also extended the Longshore Act to civilian employees on defense bases, employees of non-appropriated fund instrumentalities such as military exchanges, employees of government contractors injured overseas by war risk hazards, and workers on oil drilling rigs on the outer Continental shelf. See Defense Base Act, Act of Aug. 16, 1941, ch. 357, § 7, 55 Stat. 622 (codified as amended at 42 U.S.C. §§ 1651-1654)' Nonappropriated Fund Instrumentalities Act, Act of June 19, 1952, ch. 444, § 2, 66 Stat. 139 (codified as amended at 5 U.S.C. §§ 8171-8173)' War Hazards Compensation Act, Act of December 2, 1942, ch. 668, Title I, § 1702)' and Outer Continental Shelf Lands Act, Act of Aug. 7, 1953, ch. 345, § 4(c), 67 Stat. 462 (codified as amended at 43 U.S.C. § 1333(c)).

"This is a consensus report. It received the unanimous support of every member of the conference committee, from both parties and every ideology. To make certain that there are no grounds for misinterpretation or abuse, either by those charged with enforcing the law, the courts, or others, we have spoken very clearly both in the statutory language and in the statement of managers.

We meant what we said, and we said what we meant. We do not want to see protracted court battles over the intent of Congress. If it isn't in the statute or clarified in the statement of managers, it should be accorded little if any legislative intent.

This is a complicated bill, but its underlying principle is really quite simple. Some employers and employees who were never supposed to be covered by the Longshore Act have been included in its coverage; some of the benefits have been excessive.

By the same token, individuals who should receive Longshore Act compensation, medical assistance, death and survivor benefits have found the law and the courts unresponsive to their legitimate claims for assistance, as documented in yesterday's Washington Post.[9]

Cong. Record, H 9730, Sept. 18, 1984.

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[9]Congress was urged to enact a provision in the continuing budget resolution exempting WMATA from any tort liability that would otherwise be resurrected by the Longshore Amendments. The Congress failed to pass any such exemption. See Congressman Miller's reply. (Appendix E).

Congressman Miller went on to explain the significance of the amendments overruling *Washington Metropolitan Area Transit Authority* v. *Johnson,* 104 S. Ct. 2827 (1984). A review of his statement, in the context of his reference to the Post article, leaves no doubt that where Congress intended the 1984 Longshore Amendments not to apply, it was specifically indicated. From this legislative history, which is not even mentioned by the *O'Connell* Court, it is clear that it is the intent of Congress that these amendments apply to 1928 Act claims, regardless of their unpopularity with the staff of the Washington Post.

An additional statutory provision further undermines the rationale of *O'Connell* and is extremely important to the resolution of this issue.

Section 1-206 of the District of Columbia Self-Government Act, D.C. Code §§ 1-201 *et seq.* (1981), provides:

> § 1-206. Congressional reservation of authority.
>
> Notwithstanding any other provision of this Act, *the Congress of the United States reserves the right, at any time,* to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation *to amend* or repeal *any law in force in the District prior to or after enactment of this Act* and any act passed by the Council. (emphasis added)

Under this provision, Congress reserves the right to amend, *at any time,* any Congressional enactment in force in the District. The parties in this case *agree* that the 1928 Act and, by extension, the Longshore Act are still in force

in the District of Columbia for the class of cases they govern. Since Congress reserved the right to amend *any* statute in effect in the District, it would strangle the meaning of this section (as well as that of the general savings statute) were the Court to hold that the 1984 Longshore Amendments were incapable of affecting the application of the Longshore Act in the District of Columbia.

As we have discussed, the substantive provisions of the Longshore Act will continue to govern a class of District of Columbia compensation cases for many years to come, and the Act remains under the jurisdiction of the United States Department of Labor. It would be preposterous to nevertheless conclude that, while Congress may amend the New D.C. Act (with which the federal government has no involvement), it may not amend the statute that City Council has left under its full control. In effect, this provision is another savings statute applicable to this case: one that manifests Congress' desire to retain the ability to amend any Acts of Congress applicable in the District.

The *O'Connell* Court held that the repeal by City Council of the 1928 Act *prevented* the 1984 Longshore Amendments from applying to District of Columbia cases governed by the Longshore Act. *O'Connell v. Maryland Steel Erectors, Inc., supra* at 1142 (D.C. 1985). Were this interpretation of Council's intent correct, it would bring the repeal provision of the New D.C. Act into *direct* conflict with Section 1-206. While the City Council had the right to legislate in the workers' compensation field, it does *not* have the right to *prevent* Congress from legislating in that field, and any attempt to do so would be violative of the Home Rule Act. The only interpretation of the repeal provision of the New D.C. Act that does not render it null and void is an interpretation that, in harmony with the pur-

poses of Section 1-206 and the general savings statute, recognizes Congress' right to amend any law in effect in the District.

In summary, although it appears that no Court has yet interpreted Section 1-206, it quite clearly constitutes a reservation by Congress of the right to amend any statute in force in the District. The statute should be interpreted by this Court in a manner that serves rather than frustrates the intent of the District of Columbia City Council and Congress. The Council has clearly shown that it wishes to leave the administration of pre-New Act claims under the control and guidance of the U.S. Department of Labor, Congress and the United States Courts of Appeal. Congress, in its wisdom, has concluded that amendments to the Longshore Act were needed. Since Congress clearly intended that the amendments apply in the District, Section 1-206 should serve to effectuate that intent.

II. THE AMENDMENT TO SECTION 933(b) HAS EFFECTED A STATUTORY REVERSION OF THE CIVIL CAUSE OF ACTION TO THE PETITIONER WHILE THE CASE WAS PENDING ON APPEAL, GRANTING HIM STANDING TO PROCEED WITH HIS CAUSE OF ACTION

Under the framework of the 1984 Amendments, there is a hiatus of 90 days after the original six-month assignment period, during which time the employer or carrier is vested with the right to institute a cause of action against any third-party responsible for the injuries sustained by the worker. After the expiration of the 90-day period, the right to maintain a cause of action reverts to the employee. Thus 90 days after the effective date of the amendments, September 28, 1984, on December 27, 1984, the petitioner

again was reassigned his statutory claim. It is undisputed that the compensation carrier did not file any action in this case.

The doctrine of "relation back" is generally invoked to associate amendments with the date of the original pleadings, so that they would not be barred by the statute of limitations whenever the claim or defense asserted in the amendment arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. *See Deupree* v.*Levinson,* 186 F.2d 297 (6th Cr. 1950); *Hodges* v. *Kimball,* 91 F. 845 (4th 1899); *United States* v. *Memphis Cotton Oil Co.,* 288 U.S. 62 (1933); *Missouri, Kansas & Texas Ry. Co.* v. *Wolf,* 266 U.S. 570 (1925).

These decisions are based upon the general proposition that in such cases the defect is purely formal or procedural, and that essential justice requires that the amendment be permitted. It is pointed out repeatedly, as in the facts in this case, that there is no actual change in the cause of action and that the defendants are in no way prejudiced by allowing the amendment.

As stated by Justice Holmes in *N.Y. Central & Hudson River Rd. Co.* v. *Kinney,* 260 U.S. 340, 346 (1922):

> "When a defendant had had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied."

The doctrine of "relation back" is fully consistent with and furthers the fundamental policy of seeing that cases are tried on the merits and not dispensed with due to pro-

cedural technicalities. *Staren v. American Nat'l. Bank & Trust Co. of Chicago,* 529 F.2d 1257, 1263 (7th Cir. 1976); *Defranco* v. *United States,* 18 F.R.D. 156, 159 (S.D. Cal. 1955). *See also, Williams* v. *United States,* 405 F.2d 234, 236 (5th Cir. 1968). The important part of the law is that which gives a right of action, and not that part which provides who may enforce it; the latter is an incidental provision. *Lang* v. *Houston, W. St. & P.F.R. Co.,* 75 Hun. 151, 27 N.Y.S. 90 (1899).

The doctrine of "relation back" is in essence a principle founded in equity and invoked when needed to avoid unjust results. Although "relation back" is generally invoked to relate an amendment back to the original complaint, courts have invoked the doctrine, in situations closely analogous to the present case. The following two cases illustrate fact situations similar to this case where the courts have invoked the doctrine to allow an action to be tried on its merits even though it was commenced at a time when the plaintiff did not have the technical right to do so but subsequently acquired the right after the statute of limitations had run.

In *Co-Opportunities* v. *Nat'l. Broadcasting Co.,* 510 F. Supp. 43 (N.D. Cal. 1981), Broadcast Marketing Co. (BMC) was the owner of a copyright. In June of 1977, BMC transferred the copyright to plaintiff Co-Opportunities. Plaintiff, however, did not acquire the right to sue for infringements on the copyright that occurred prior to the date of transfer. Plaintiff acquired such right on December 16, 1980 yet commenced action for infringement againt defendant National Broadcasting Co. in June of 1979 for act of infringement that occurred in August of 1976. Had plaintiff filed suit subsequent to December 16, 1980, the date he acquired the right, his right of action

would have been barred by the applicable statute of limitations.

On these facts, defendant argued that plaintiff lacked standing to sue in June of 1977 and since the statute had run before plaintiff acquired standing on December 16, 1980, the suit could not be brought. The court, however, invoked the doctrine of relation back and held that because plaintiff acquired standing on December 16, 1980, justice demanded that the date on which he acquired standing to bring the action related back to the date he filed the initial complaint. Even though plaintiff did not amend the pleadings, the court nonetheless found that the complaint filed in July of 1979 was effective to commence the action.

The court focused on whether the defendant was given sufficient notice, and whether the claim as originally filed was essentially the same as would be heard at trial. Answering these questions in the affirmative, the court determined that the plaintiff's right to be heard on the merits should not be defeated by an overly technical application of the applicable statute of limitations.

In *Castle* v. *Lockwood-MacDonald Hospital,* 40 Mich. App. 597, 199 N.W.2d 252 (1972), plaintiff's deceased husband either fell or jumped to his death from a window in a room belonging to defendant Lockwood-MacDonald Hospital. Plaintiff was appointed special administratrix of her husband's estate on May 14, 1970 and on May 15, 1970, commenced a wrongful death action against defendant hospital alleging that it was negligent in maintaining an open, low silled window in deceased's room. Under Michigan law, plaintiff as special administratrix did not have standing to sue for the wrongful death of her husband at the time she commenced the action. She did,

however, acquire the right by a court order on June 15, 1970. The court granted defendant's motion to dismiss the action holding that at the time plaintiff commenced the action, she was without standing and that although she did subsequently acquire the right on June 15, 1970, the statute of limitations had run as of May 17, 1970 thus barring her claim.

The Michigan Court of Appeals reversed, holding that the court order of June 15, 1970 giving the plaintiff the power to commence actions on behalf of the estate will relate back to the date the action was filed even though the statute of limitations ran between the date of filing the action and the date the empowering order was entered. Plaintiff as in *Co-Opportunities* did not amend the complaint. The court placed great emphasis on the fact that plaintiff in good faith and with reason believed herself equipped with the necessary legal authorization to institute the suit. The court also noted that the reason for the application of the doctrine of relation back as a means of defeating the defense of the statute of limitations is the desire of the courts not to have valid claims avoided by legal technicalities provided the plaintiff acted in good faith, and had some reasonable grounds for believing the existence of a right to commence suit.

The Petitioner submits that the relevant facts in the instant case are on all fours with the facts in *Co-Opportunities* and *Castle,* and that the doctrine of "relation back" should likewise be invoked to permit the Petitioner to proceed with the action he filed.

Here, as in *Co-Opportunities* and *Castle,* plaintiff commenced an action within the statute of limitations in good faith and in accordance with the prevailing law in this jurisdiction. Subsequently, the law was interpreted in such a way as to bar his claim.

In the instant action, Maryland Steel also received timely notice within the statute of limitations that O'Connell was instituting a tort action against it. Thus Maryland Steel will not be prejudiced if it is required to maintain its defense on the merits. But for the Supreme Court's holding in *Rodriguez,* rendered almost two years subsequent to the filing of the complaint, the respondent would have no ground to challenge petitioner's standing to bring suit *on the date of filing.* Pursuant to the new amendments, which were made applicable to pending cases, the petitioner has been reinvested with his cause of action. There is simply no just reason for not permitting the reassignment to cure the lack of standing that existed at the time of actual filing. As a matter of common sense, it should be noted that the *O'Connell* decision benefits neither the employer nor the injured employee, but only the tortfeasor who obtains a windfall for his tortious misconduct. It is an unconscionable result, and should be reviewed by this Court.

CONCLUSION

For each and all the reasons set forth above, Petitioner respectfully urges this Honorable Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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January 17, 1986

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001

No. 82-1486

JOHN D. O'CONNELL,
Appellant,

v. CA14192-79

MARYLAND STEEL ERECTORS, INC., ET AL.,
Appellees.

BEFORE: Pryor, Chief Judge; *Nebeker, Mack, Newman, *Ferren, Belson, Terry, and Rogers, Associate Judges; *Reilly, Chief Judge, Retired.

ORDER

On consideration of appellant's petition for rehearing and/or rehearing en banc, and the responses thereto, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that the majority of the judges of this court has voted to deny the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Associate Judges Newman and Rogers would grant rehearing en banc.

Copies to:

Honorable Sylvia Bacon

Clerk, Superior Court

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District of Columbia
Court of Appeals
Filed Oct 21 1985

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS
No. 82-1486
John D. O'Connell, Appellant,

v.

Maryland Steel Erectors, Inc., et al, Appellees

Appeal from the Superior Court
of the District of Columbia

(Hon. Sylvia Bacon, Trial Judge)

(Reargued April 1, 1985 Decided July 5, 1985)

Peter J. Vangsnes for appellant. *William C. Burgy* and *Karl N. Marshall* were on the briefs, for appellant.

Walter J. Murphy, Jr., with whom *Hugh W. Farrell* entered an appearance, for appellee Maryland Steel Erectors, Inc.

Gary W. Brown, entered an appearance for appellee Steele & Moroney, Inc.

Walter A. Smith, Jr., with whom *Vincent H. Cohen* and *Robert B. Cave* were on the briefs for *amicus,* Washington Metropolitan Area Transit Authority.

Before Nebeker and Ferren, *Associate Judges,* and Reilly, *Chief Judge, Retired.*

Reilly, *Chief Judge, Retired:* This is an appeal from the dismissal of an action for negligence brought by a construction worker against the corporate owner of a rotating crane on a building project where he had suffered chest and shoulder injuries. Eight months prior to commencing such action, he had been formally awarded workmen's

compensation pursuant to a disability claim filed against his own employer, the contractor who had hired him to work on the site. At the time of the injury, the District of Columbia workers' compensation statute incorporated by reference the provisions of the Longshoremen's and Harbor Workers' Compensation Act of 1927, as amended, 33 U.S.C. § 901 *et seq.*, one of which, Section 33(b)[1] allowed a disability claimant, even after accepting workmen's compensation, to sue a person other than his employer within six months after the award. If he failed to do so, his right of action under this subsection was assigned to his employer.

In the instant case, as appellant had let the six-month deadline elapse before beginning his action, the trial court granted a motion to dismiss, observing that in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981), it was established that the running of the six-month period barred any suits not initiated by the employer or his subrogee.[2]

[1]33 U.S.C. § 933(b) (1982). This particular subsection was one of the amendments passed by Congress in 1959 to the Longshore Act. Prior to its enactment, a disabled worker was confronted with a choice of remedies. He could file a claim against his own employer for statutory compensation, irrespective of negligence, or sue a third party whose conduct caused the injury — but he could not do both. If the worker elected and received compensation, the employer or his insurance carrier under subrogation principles then could sue a third person deemed responsible for the accident for reimbursement.

[2]In *Rodriguez*, the Supreme Court had granted certiorari to resolve a conflict between the Courts of Appeal of the Second and Fourth Circuits on the interpretation of Section 33(b) of the Act. Just eight days after the Second Circuit had decided that when injured longshoremen failed to bring suit within six months, the employer to whom their claims had been assigned thereafter had the exclusive right to pursue third-party claims, the Fourth Circuit issued an opinion to the contrary in *Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980). Its holding was that if the assignee chose not to sue, the disabled workers by appropriate pleadings could gain reassignment of their cause of action.

Citing *Rodriguez,* we reached the same conclusion in two similar cases, *Dodson v. Washington Automotive Co.,* 461 A.2d 1020 (D.C. 1983) and *Milligan v. Brian Construction Development Co.,* 485 A.2d 593 (D.C. 1984). We are now urged to vacate the order of the trial court and remand the case for trial on the grounds that (1) *Rodriguez* is not controlling with respect to litigation commenced before the release of that opinion, and (2) in any event a Congressional amendment to the Longshore statute (which became law during the pendency of this appeal) has breathed new life into the dismissed action. Deeming neither of the grounds urged for reversal as persuasive, we affirm.

I

In developing his first ground, appellant asserts that the motions court in this case should have deferred to *Potomac Electric Power Co. v. Wynn,* 120 U.S. App. D.C. 13, 343 F.2d 295 (1964). He points out that this decision of the United States Court of Appeals for this circuit was not specifically disapproved by the Supreme Court until it handed down its *Rodriguez* opinion in 1981, more than a year after appellant had begun his action in the Superior Court. In the *Wynn* case, the plaintiff waited for sixteen months after being awarded compensation benefits before filing an amended complaint against PEPCO. The appellate court affirmed the denial of a motion to dismiss. It recognized that after the six-month period had run, the right to recover the compensation award was assigned to the employer who had paid it, but nevertheless that if such assignee then failed to exercise such right – for any reason – the injured employee was not precluded from suing.

In arriving at this conclusion – seemingly at odds with the actual wording of the statutory language interpreted –

the court cited *Czaplicki v. The Hoegh Silvercloud,* 351 U.S. 525 (1956), a case which antedated the 1959 amendments to Section 33.[3] In *Czaplicki,* the petitioner's rights of action against third parties were assigned by the act to his employer after he accepted compensation under an award. The employer's insurer, Travelers Insurance Company, was in turn subrogated to those rights. Travelers, however, was also the insurer of one of the third parties subject to suit. Thus, facing additional liability if such right of action was successfully asserted, it had no reason to bring suit. The Supreme Court held that where the assignee's interests are in conflict with those of the employee, the latter had a cause of action against a negligent third party, despite the prior assignment.

But by holding that an employee can bring suit against a third party whenever the employer-assignee fails to do so, the *Wynn* decision went considerably beyond *Czaplicki.* Professor Larson described *Wynn* as the "most extreme extension" of *Czaplicki.*[4] It also seems that the *Wynn* opinion missed the point of the 1959 amendment to Section 33, which was to protect employees in *Czaplicki* situations by affording them a right to sue independently for a six-month period.

Appellant's position, however, is that irrespective of whether or not *Wynn* was properly decided, it was still the

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[3]Section 33(b), 33 U.S.C. § 933(b) (1982), reads as follows:

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

[4]2A A. LAWSON'S, WORKMEN'S COMPENSATION LAW § 75.47 at 14.555 (1982).

law of this jurisdiction when he commenced his action, for under the policy of this court enunciated in *M.A.P. v. Ryan,* 285 A.2d 310, 312 (D.C. 1971), decisions of the United States Court of Appeals for this circuit rendered prior to February 1, 1971, "like the decisions of this court, constitute the case law of the District of Columbia."[5] From this premise, he argues that the dismissal of his action on the authority of *Rodriguez* gave retroactive impact to that decision in circumstances which the Supreme Court itself had deemed unjust. He distinguishes our holding in *Dodson* and *Milligan, supra,* which also treated *Rodriguez* as controlling, on the ground that the issue of retroactivity was not specifically addressed in those opinions – as it had not been raised by the unsuccessful plaintiffs.

The problem of drawing a line between the kind of appellate decisions which should be deemed purely prospective, rather than retroactive in their effect, has been considered in several cases by the Supreme Court in recent years. The one upon which appellant primarily relies is *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). There the court remarked that a threshold requirement for depriving a decision of retroactive effect is that such decision "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* at 106 (citations omitted). That factor alone is not conclusive for the court also stressed that inquiry should be made into the history and the purpose of the new rule of decision and "whether

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[5]The *Ryan* opinion, reserved the right of this court sitting en banc, to refuse to follow such decisions. *Ryan, supra,* 285 A.2d at 312. Another well recognized exception to this principle of deference applies to pre-1971 decisions discredited by later holding of the Supreme Court, *e.g., Capital Holding Corp. v. District of Columbia,* 374 A.2d 573 (D.C. 1977).

retrospective operation will further or retard its operation,' " *id.* at 106-07 (quoting *Linkletter v. Walker,* 381 U.S. 618, 629 (1965)), and whether inequity would result from retroactivity.

The plaintiff in *Chevron* was injured while working on an offshore drilling rig close to the Louisiana coast, but did not file suit against Chevron until two years after the accident.[6] During pretrial discovery, the Supreme Court published *Rodriguez v. Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969), in which overruling a long line of federal decisions, it held that under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (1982), state law, rather than admiralty law, is applicable to actions based on personal injuries occurring on offshore structures. On the authority of that holding, the federal district court where the action was pending then held that Louisiana's one-year statute of limitations barred respondent's suit, but was reversed by the Court of Appeals for the Fifth Circuit.

In agreeing that *Rodriguez* should not have been applied retroactively, the Supreme Court emphasized that in addition to being a case of first impression in that court, *Rodriguez* overruled decisions clearly establishing "that admiralty law, including the doctrine of laches, applies through the Lands Act." *Chevron, supra,* 404 U.S. at 107 (citations omitted). Hence, it could not "be assumed that . . . [plaintiff] did or could foresee that this consistent interpretation of the Lands Act would be overturned." His reliance on the old law, therefore, was well-founded and consequently the dismissal of his action for untimeliness

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[6]The *Chevron* case did not involve the Longshore Act, for the injured worker apparently elected to sue his employer directly instead of claiming workmen's compensation.

"on the basis of superseding legal doctrine . . . quite unforeseeable" was reversible error. *Id.* at 108.

In a subsequent opinion, *United States v. Johnson,* 457 U.S. 537 (1982), the Supreme Court undertook an extended review and analysis of the factors justifying the nonretroactive application of judicial opinions. It concluded that when the court has declared a rule of criminal procedure to be "a clear break with the past," it has almost invariably found "such a 'newly minted principle' nonretroactive." *Id.* at 549 (citation omitted). In a footnote which cited *Chevron, supra,* as an example, the court observed that in the context of a civil case, the "clear break principle" has unusually been stated as the threshold test. *Johnson, supra,* 457 U.S. at 550 n.12. We drew heavily upon these observations in *Brodis v. United States,* 468 A.2d 1335, 1337 (D.C. 1983), in refusing to set aside a conviction in a case tried prior to a novel holding of this court overruling a longstanding procedural practice.

Accordingly, the issue before us turns on the question of whether the construction of Section 33(b) by the Supreme Court in the *Rodriguez* case represented a "clear break with the past." In our opinion, it did not, for the rule of decision in *Wynn* at the time appellant's action was filed here had been undermined by intervening legislation in Congress. In the *Wynn* opinion, the court pointed out not merely the potential of conflicting interests in cases like *Czaplicki,* where there was a common insurer, but to another decision discouraging employers from suing third-party tortfeasors, *viz., Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124 (1956). There it was held that a shipowner liable for injuries to a longshoreman could recover over against the employer-stevedore for breach of the latter's implied duties of safety. Plainly this prospect of double liability would deter any

assignee from suing to recover the compensation paid to the disabled employee.

Congress remedied this defect in the Act in 1972 by adopting an amendment to Section 5(b), 33 U.S.C. § 905(b), which eliminated a third party's right of indemnification from the primary employer thereby repudiating the *Ryan* doctrine. The United States Court of Appeals for the Second Circuit noted these later changes in the Act in specifically declining to follow the *Wynn* holding. *Rodriguez v. Compass Shipping Co., supra,* 617 F.2d at 955, 961. Moreover, even before the 1972 amendment, the only other circuit court called upon to interpret Section 33(b) expressed the view that an evidentiary showing of a conflict of interest between employee and employer-assignee was necessary to enable workers to maintain actions filed after the six-month deadline. *McClendon v. Charente Steamship Co.,* 348 F.2d 298 (5th Cir. 1965).

Since the 1972 amendments, the bar of this jurisdiction has manifested no reliance upon the *Wynn* holding.[7] In supporting plaintiffs who began actions against third persons more than six months after accepting compensation, their counsel have successfully argued that the six-month period does not start to run until a formal award is made – a point quite unnecessary to make if *Wynn* was still controlling law. *See Carey v. Crane Service Co.,* 457 A.2d 1102 (D.C. 1983); *Collier v. John Mendis, Inc.,* 526 F. Supp. 459 (D.D.C. 1981); *Fearson v. Johns-Manville Sales Corp.,* 525 F. Supp. 671 (D.D.C. 1981). It is also significant that in the case before us, it is not contended that the individual claimant (appellant here) placed any reliance

[7]In *Mendes v. Johnson,* 389 A.2d 781 (D.C. 1978) (en banc), we stated that a relevant factor with respect to the application of a new rule of decision was the extent of the reliance of the parties on the old rule.

upon the *Wynn* decision – or indeed was even aware of it – when he permitted more than six months to go by before bringing suit against appellee.

It is our opinion that *Rodriguez* was typical of numerous holdings of the Supreme Court, resolving conflicts of decision among different circuit courts of appeals on the interpretation of a specified statute. The impact of such resolutions by the highest court does not affect the rights of parties who have entered into settlements or accepted as final unappealed judgments of lower courts based on the authority of the rule of decision ultimately disapproved, but they become controlling authority for the disposition of pending cases.[8] As the Supreme Court observed in a context obviously applicable to appellant's thesis that the court below should have treated *Wynn* as controlling precedent, "[d]eviant rulings by circuit courts of appeals . . . cannot generally provide the "justified reliance' necessary to warrant withholding retroactive application of a decision construing a statute as Congress intended it." *United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970).

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[8]The same court which has handed down the *Wynn* opinion, concluded after *Rodriguez* that the 1959 and 1972 amendments had undercut even the basis for the *Czaplicki exception to Section 33(b). Accordingly, it dismissed a pending action, saying that the statute "no longer permits an employee to institute a third party action after the six month statutory window" citing with approval our memorandum opinion in Westbrook v. Hutchinson Crane Excavating Co.*, No. 82-1151 (D.C. June 30, 1983). *See Johnson v. Bechtel Associates*, 230 U.S. App. D.C. 297, 309, 717 F.2d 574 (1983) *reversed on other grounds, sub nom., Johnson v. WMATA, infra.*, n.9.

II

After this appeal was first argued, appellant moved for reargument, calling our attention to a new statute enacted by Congress while this case was *sub judice, viz.*, the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, approved September 28, 1984 (referred to herein as "1984 Act"). He contended that one of the amendments in that statute overruled the Supreme Court's decision in *Rodriguez v. Compass Shipping Co., supra,* and thus deprived our own decisions in *Dodson* and in *Milligan, supra,* of precedential significance. This particular amendment, revising Section 33(b) of the Longshore Act, provides that if the employer to whom the worker's right to sue a third-party tortfeasor has been assigned (after the running of the six-month period) fails to exercise such right within ninety days after assignment, such right reverts to the worker. Such amendment – as appellant correctly pointed out – was one of those provisions in the new act which [Section 28(a)] "apply both with respect to claims filed after such [enactment] date and to claims pending on such date." Accordingly, appellant argues that although he might have lost his right to sue a third party under the old act, such right has now reverted to him, because his employer (or subrogee) allowed ninety days to elapse without commencing any action.

In order to examine the possible impact of the 1984 Act upon this case and other pending litigation in the District, we granted appellant's motion for reargument in an order also allowing a motion by the Washington Metropolitan Transit Authority (WMATA) to file an amicus brief and to participate in the argument.

If appellant's construction of the new statute is correct, it would mean that a large number of employers whose as-

signed rights against third parties had already vested 90 days or more before the effective date of the new act, but who had not yet exercised them, would be deprived retroactively of ever being able to do so. If this was indeed the purpose of the statute, there would be serious questions about its constitutional validity.

Appellees, noting that the 1984 amendments to Section 33 also do away with priority of the employer's lien on the proceeds of a judgment against third parties, argue that the recent enactment conflicts with the Constitution, unless the words "claims pending" can be construed as limited to unadjudicated agency claims in contradistinction to actions at law pending in the courts.[9] But appellant contends that the provision he relies upon is more analogous to amendments affecting statutes of limitations, in which the doctrine of "relation back" has been successfully invoked, citing several authorities including *New York Central & Hudson R.R. v. Kenney,* 260 U.S. 340, 346 (1922).

We need not deal with such constitutional issues, however, for the crucial question here is whether the 1984

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[9]The actual wording of the statute seems to sustain such a limited construction, for other sections which regulate the prosecution of "claims" plainly refer to agency proceedings. But the correctness of such statutory interpretation is clouded by language in the report of the joint conference managers with respect to other amendments, set forth in Section 4 of the 1984 Act which revised two provisions of the Longshore statute for the purpose of depriving *WMATA v. Johnson,* 104 S.Ct. 2827 (1984) of "precedential effect." Jt. Rep. of Conference managers, Daily Cong. Record H.R. 9593; Sept. 14, 1984. In explaining these amendments, the conference report also stated – presumably with regard to the intent of Section 28(a):

> The Conference substitute also provides a special effective date so that these amendments apply to pending suits. This will avoid the dismissal under WMATA of third party suits which were pending or on appeal on the date of the enactment.

amendments to the Longshore Act have any relevance to this case. Appellant's injury did not occur in maritime employment. His right to compensation and to subsequent actions for damages consequently derives entirely from the District of Columbia Workers' Compensation Act of 1928, D.C. Code §§ 36-501,-502 (1973 ed.)[10] This Congressional statute in turn did make the provisions of what was then called the Longshoremen's and Harbor Workers' Compensation Act of 1927, including future amendments thereto, applicable to the injury or death of employees of persons carrying on private employment in the District.[11] But the 1928 act – one of purely local application – was expressly repealed by an act passed by the District Council in 1980, effective July 24, 1982.[12] Hence, appellees contend that amendments by Congress to the Longshore Act passed after the effective date of the repealer, have no bearing whatsoever on the rights of litigants, like appellant, who were awarded workers' compen-

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[10]Act of May 17, 1928; 45 Stat. 600, ch. 612 § 1, D.C. Code § 36-501 (1973 ed).

[11]Despite this incorporation by reference, it was recognized that the two statutes were separate and distinct, the authority of Congress to enact each piece of legislation resting upon powers granted by different clauses in the Constitution. *Gudmundson v. Cardillo*, 75 U.S. App. D.C. 230, 126 F.2d 52 (1942). The court noted that Congressional power to legislate with respect to longshoremen and other harbor workers rested on concept of admiralty jurisdiction over navigable waters (the 1927 act); and upon the clause granting Congress legislative authority over the territorial "seat of government" to deal with injuries in every type of work in the District of Columbia (the 1928 act).

[12]27 D.C. Reg 2503, 2541. Section 46 provides:

> An act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes, approved May 18, 1928 (45 Stat. 600; D.C. Code sec. 36-501-503) is hereby repealed.

sation because of injuries incurred in land based occupations in the District of Columbia. We agree.

Such repealer was merely one provision included in a comprehensive statute which replaced the District of Columbia Workers' Compensation Law of 1928 with a new method for compensating workers disabled in private employment in the District. D.C. Code §§ 36-301 to -344 (1981); D.C. Law 3-77, July 1, 1980, 27 DCR 2503. In adopting the new act the Council divorced the local workers' compensation system entirely from the Longshore Act of 1927. It provided that claims should be filed with and adjudicated by the municipal government instead of by a Federal agency and set a scale of compensation for different kinds of disabilities substantially below the corresponding levels in the Longshore Act – conforming more closely to the schedules established by state compensation laws in such neighboring jurisdictions as Maryland and Virginia.[13]

Shortly after its passage, the enforcement of the new statute was enjoined by an order of the Superior Court in a suit brought by labor organizations. It was not until 1982 that such order was reversed by a decisioin of this court holding that the Council had not exceeded its legislative authority under the District of Columbia Self-Government Act of 1973, D.C. Code §§ 1-102 to -295 (1981).[14]

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[13]At legislative hearings, the local business community made a showing that convinced the Council that construction companies, mercantile enterprises, and service industries doing business in the District were unfairly burdened by ever increasing insurance premiums charged by carriers to cover employers subject to disproportionately greater liability under the Longshore Act than under comparable state laws.

[14]*District of Columbia v. Greater Washington Central Labor Council AFL-CIO,* 442 A.2d 110 (D.C.), *rehearing denied,* 445 A.2d 960 (D.C. 1982), *cert. denied,* 460 U.S. 1016 (1983).

Because of the injunction, claims filed during the pendency of this litigation continued to be processed by the United States Department of Labor and governed by the old act. When the validity of the new statute was upheld, the Council by legislative resolution postponed its effective date to July 24, 1982. We subsequently held that a worker injured before this date had no rights under the new act, as such an injury was then still covered by the 1928 Act, and compensability depended on its provisions. *Garrett v. Washington Air Compressor Co.*, 466 A.2d 462 (D.C. 1983).

Appellant, pointing out that his injury also occurred before the effective date of the new act and was therefore covered by the 1928 act, incorporating the Longshore Act "including all amendments that may hereafter be made thereto,"[15] argues that he is therefore entitled to invoke the Longshore Amendments of 1984 with respect to the time limitations in law suits authorized by Section 33(b), notwithstanding the repeal of the 1928 act. In our opinion this argument flies in the face of a savings statute enacted by Congress to deal with the legal effect to be accorded a repealed statute. It provides in pertinent part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute . . . and such statute shall be treated as still remaining in force *for the purpose of sustaining any proper action* or prosecution for the enforcement of such penalty, forfeiture or liability.

1 U.S.C. 109 (1982) (emphasis added).[16]

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[15]Act of May 17, 1928 n.10, *supra.*

[16]1 U.S.C. 109 is a general act of Congress applicable to the District of Columbia. D.C. Code § 49-301.

Accordingly, so far as appellant was concerned, despite the repeal of the 1928 act, his rights of action against third party tortfeasors were still preserved by the provisions of that statute. But this certainly does not mean that the limitations such statute had imposed on such rights were removed by subsequent Congressional amendments to another act.

As a result of the Council action repealing the District of Columbia 1928 Act, that act had ceased to exist by 1984, when Congress amended the Longshore Act. Had it not been for the repealer, the 1928 act would indeed have incorporated those amendments, including the revisions of Section 33 which would have benefited appellant's cause. But as the 1928 act was no longer on the books, what Congress subsequently did to the Longshore statute did not affect any rights created by such prior law.

Our conclusion on this issue is identical to that reached by three different federal trial judges in this jurisdiction, presiding over cases in which persons suing under the District of Columbia Act of 1928 contended that their rights had been enlarged because of the 1984 Congressional amendments to the Longshore Act. In each instance, these judges held that such amendments had no impact upon the workers' compensation laws governing the District.

The leading case, entitled *In re Metro Subway Accident Referral,* Misc. No. 82-306, slip op. (D.D.C. Dec. 18, 1984),[17] was an opinion and order of Judge Pratt dismissing approximately 90 lawsuits filed against the Transit Authority, decisions which had been stayed because of the pendency of appeals ultimately resolved by *WMATA v. Johnson, supra note* 9, 104 S. Ct. at 2836.

[17]Cited with approval and followed in *Stokes v. Hyman Construction Co.,* C.A. No. 84-1418, slip op. (D.D.C. Jan. 18, 1985) (Parker, J.); and in *Lewhew v. AFGO Engineering Corp.,* C.A. No. 81-1593, slip op. (D.D.C. Feb. 27, 1985) (Gasch, J.)

Plaintiffs in these suits – for the most part tunnel workers employed by construction subcontractors – having incurred occupational disability filed claims for compensation against their immediate employers under the District of Columbia 1928 Act. The resulting compensation awards were paid by an insurance carrier from whom WMATA itself – the general contractor – had purchased a "wrap-up" policy covering all the numerous subcontractors on the subway project against potential liability for injuries to the workers they hired. This precautionary step relieved such subcontractor of the necessity of taking out insurance on their own account.

Claimants filed tort actions against WMATA alleging that the Authority was negligent in permitting them to work under conditions likely to cause respiratory injuries.

Under Section 4(a) of the Longshore Act (then incorporated in the 1928 District of Columbia Act), which requires every employer to secure payment to his employees for payment compensable under the act, a contractor is under an obligation to secure payments to employees of his subcontractors unless the subcontractor has secured such payments. Section 5(a) of the act grants immunity to employers who have complied with the preceding section against additional liability.

The theory of the plaintiffs was that since their own employers – the subcontractors – had not been in default of their obligation to secure payments (*i.e.*, to carry liability insurance), WMATA was suable as a third party tortfeasor and could not claim immunity as an "employer." In the *Johnson* case, *supra,* the Supreme Court rejected this view in an opinion handed down June 26, 1984 – just before its summer recess. Soon thereafter, the United States District Court issued a rule to show cause as to why these actions and other pending actions against WMATA by plaintiffs in similar situations should not be dismissed.

In the interim, because of differences between the bills passed by the Senate and House on the Longshore Act Amendments, the measure had been referred to a joint conference committee. Although there was nothing in the versions of the legislation approved by either body dealing with the issue considered in the *Johnson* case, the conferees inserted a new provision in the conference substitute which amended Section 5(a) of the Longshore Act, so as to make it clear that a general contractor who took out worker's compensation insurance for his subcontractor's employees did not gain immunity as an "employer," unless such action was triggered by an actual failure of a subcontractor to comply with his statutory duty to "secure" compensation. This meant that general contractors who had followed the course of action taken by *WMATA* were no longer immune from liability in suits brought by employees of subcontractors, for the conference report, in explaining such amendment, expressly disapproved of the Supreme Court holding in the *Johnson* case, *supra,* and noted that in law suits still pending or on appeal, such holding should not be accorded "precedential effect" – an apparent reference to Section 28(a) of the 1984 Act mentioned earlier in this opinion.[18]

The conference substitute was passed by both branches of Congress without floor debate – the motion to adopt in the Senate following brief explanations by three of the Senate conferees, none of whom alluded to the Section 5(a) amendment or indeed to any possible bearing of the bill upon District of Columbia law.[19] The President approved the enrolled bill on September 27, 1984, releasing a short explanatory statement.

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[18]Joint Explanatory Statement of the Committee of Conference, Cong. Reg. H. 9598, September 1984.

[19]*See* Cong. Rec. S. 11621 to 11627, September 20, 1984.

Thus, later in the same year in passing upon the proposition of the plaintiff to dismissal in *Metro Subway, supra,* Judge Pratt was squarely confronted, as we have been in the appeal now before us, with the question of whether or not the 1984 amendments to the Longshore Act affected pending actions filed under the local act of 1928. In a well-reasoned opinion, he decided that as a result of the repealer to which we have adverted, the recent Congressional legislation did not affect such actions, being directed solely at the various kinds of maritime employment covered by the federal act of 1927 as amended. Accordingly, deeming *WMATA v. Johnson, supra,* 104 S. Ct. at 2827, still controlling with respect to the cases in the District Court, he dismissed them, although he did remark that the joint statement of the conferees is "somewhat ambiguous as to whether Congress was thinking of the Johnson litigation or the principle embodied in the *Johnson* decision."*In re Metro Subway Accident Referral, supra,* slip op. at 7 n.11.

In our view, Judge Pratt, in the absence of any wording in the new act referring to workers' compensation in the District, was fully justified in concluding that it was only the "principle" or rule of decision in *Johnson,* that had been overruled. There are numerous operations covered by the Longshore Act, *e.g.,* dry-dock overhaul of vessels, off-shore oil rigs, shipbuilding, etc., which require the services of literally scores of subcontractors. Obviously the unions representing workers on such projects — and credited in the reports of the House and Senate Committees as helping to shape the new legislation[20] would scarcely regard favorably any legal doctrine having ominous

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[20]*See* H.R. Rep. No. 98-579, 98th Cong., p. 2; S. Rep. No. 98-81, *id.* p. 23.

overtones with respect to successful litigation against general contractors in maritime industries.

Appellant has assailed the conclusion reached in *Metro Subway* on several grounds, none of which are persuasive. He argues that because the 1984 act specifically makes certain provisions inapplicable or limited with regard to the Black Lung Act and the Outer Continental Shelf Act – statutes also incorporating by reference portions of the Longshore Act – the absence of any similar reference to the 1982 District of Columbia Act indicates that Congress intended that its amendments were also applicable to the latter. The short answer to this contention is that there was no occasion for Congress to exclude expressly from the application of provisions of the new law any statute already repealed. Congress was certainly aware of the repeal of the 1928 act, for the Council legislation accomplishing such action had been submitted to Congressional review for the statutory period of 30 legislative days, and became law without the disapproval of either branch.[21]

Nor are we impressed by the argument that the Department of Labor, the federal agency entrusted with the administration of the Longshore Act, has indicated that the 1984 amendments are applicable to employees injured in the District of Columbia before the new local act became effective.[22] Appellant suggests that we should defer to this administrative construction. Such rule of deference with respect to administrative "expertise" is sometimes mentioned by the courts in sustaining an agency rule or ad-

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[21] *See D.C. Code* § 36-345 (Supp. 1984).

[22] Appellant relies upon published rules for adjudication promulgated by what was apparently a lower level of the department. With commendable candor, counsel for appellant informed us after oral argument that he had been mistaken in stating that the Solicitor of Labor had issued an opinion agreeing with his position.

judication, but is never employed with respect to statutory provisions limiting the time or scope of judicial review or the institution of lawsuits, as provisions dealing with the jurisdiction of the court are not within the province of an agency to interpret.

An examination of the 1984 act and its legislative history persuades us that Congress, in revising the Longshore statute, focused attention entirely upon difficulties encountered by maritime employers and employees under its then existing provisions. One of its major concerns was the broad scope of coverage which had resulted in overlapping claims under federal and state law. It solved this problem by excluding several categories of workers previously within the act, *e.g.*, employees of yachting marinas, shoreside museums and restaurants, builders of small boats, etc., leaving such persons to the coverage of state workmen's compensation laws.[23]

If a central purpose of the 1984 legislation was to remove from coverage substantial numbers of employees whose connection with maritime industries was too peripheral, it would be passing strange to infer that Congress meant the new act to cover persons injured in purely land based occupations. Plainly the President of the United States understood that the 1984 act affected only the maritime industry, for in giving it his approval, he stated in part:[24]

> I have today signed S. 38, the "Longshore and Harbor Workers' Compensation Act Amendments of 1984." The last amendments to this Act in 1972 expanded worker coverage and provided relatively high benefits which resulted in ex-

[23] Jt., Conf. Rep., *supra, Cong.*, Rec. II 9592-93, Sept. 14, 1984.

[24] *See Statement by the President, released by White House, September 28, 1984.*

cessive costs. Today's legislation addresses these issues and makes important reforms in workers' compensation for injured workers, who contributed so much to our Nation's *vital maritime industry,* and their families. . . .

I want to congratulate all the parties to this consensus legislation. Their efforts strike a balance between continuing to provide fair and necessary benefits for injured workers and their families and, at the same time, giving employers, insurers, and the Labor Department the means to control program costs more effectively. The bill will accomplish this by clarifying the Act's coverage to exempt certain categories of workers whose work activities are *on land,* putting reasonable limits on benefits, and increasing the penalties for fraud and abuse. (Emphasis supplied).

Affirmed.

APPENDIX C

In the
Superior Court for the District of Columbia
January 8, 1986
CA No. 14192-79

JOHN D. O'CONNELL
Plaintiff

vs.

MARYLAND STEEL ERECTORS, INC.
Defendant and Third Party Plaintiff

vs.

STEELE AND MORONEY, INC.
Third Party Defendant

ORDER

This matter having come before the Court for trial and the court thereupon having entertained a Motion to Dismiss for lack of jurisdiction and the court having reviewed the memoranda on the subject submitted by the plaintiff and defendant pursuant to the Pretrial Order, and the court having heard oral argument from all parties it is by the court this 8th day of January 1982. [*nunc pro tunc*] 16th day of December, 1981

ORDERED that the Complaint herein be and the same is hereby dismissed for failure of the plaintiff to file the suit within six months of accepting workmen's compensation pursuant to a formal award as required by U.S.C.A. 33 § 933b and it is further

ORDERED that the third party complaint herein is dismissed without prejudice, as moot.

HONORABLE SYLVIA BACON

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APPENDIX D

Relevant provisions from Pub. L. No. 98-426

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

Sec. 21. (a) Section 33(b) is amended to read as follows:

"(b) Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term 'award' with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board."

EFFECTIVE DATE

Sec. 28. (a) Except as otherwise provided in this section, the amendments made by this Act shall be effective on the date of enactment of this Act and shall apply both with respect to claims filed after such date and to claims pending on such date.

APPENDIX E

Metro and Worker Liability

The Post's two editorials on the newly enacted Longshoremen and Harbor Worker's Act ["The Bill That Could Break Metro," Sept. 28; "Will They Let Metro Go Broke? Oct. 4] were replete with misrepresentations.

The editorials failed to explain why Metro faces potential liabilities — and they are only potential. They result from suits by workers who claim their health has been impaired due to Metro's negligence. The Post seems to believe that justice is best served by slamming the courthouse door in the face of diseased and injured workers, because their claims, if upheld by a court of law, would cost Metro money. That is a bizarre concept of justice.

Congress has not declared that Metro is negligent or that Metro must pay anything to these claimants. The newly enacted longshore act merely reaffirms the judicial interpretation from 1927 through 1984, when the Supreme Court issued a decision wholly out of keeping with nearly 60 years of jurisprudence. The new longshore act restores the law to its status prior to June by assuring injured workers access to court, where their claims will either be upheld or dismissed. If a court of law determines that Metro was not negligent, Metro's liability will not be $3.5 billion, or even $3.50.

As to workers recovering negligence awards in addition to compensation benefits, The Post should know that one is offset by the other, so that there is no double recovery. The offset was explained in the news story on the longshore act, as was the fact that Metro's actual financial liability, if any, is still to be determined by the courts.

The editorials' call for Congress to enact special legislation to insulate Metro from potential liability shows ex-

treme indifference to workers who allege that their health has been damaged – permanently in many cases – by the negligence of Metro. We all support Metro, want the system completed and the fares kept as low as possible. But I do not believe that Congress, or The Post's readership, believes that the way to achieve those laudable goals is by precluding injured men and women from having their day in court.

GEORGE MILLER
U.S. Representative (D-Cal.)
Chairman, Subcommittee on Labor Standards
Washington